

Ottawa, Monday, August 24, 1998

File No.: PR-98-007

IN THE MATTER OF a complaint filed by Safety Projects International Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Raynald Guay

Raynald Guay

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: August 24, 1998

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Heather A. Grant

Complainant: Safety Projects International Inc.

Government Institution: Department of Fisheries and Oceans

Ottawa, Monday, August 24, 1998

File No.: PR-98-007

IN THE MATTER OF a complaint filed by Safety Projects International Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

FINDINGS OF THE TRIBUNAL

INTRODUCTION

On May 26, 1998, Safety Projects International Inc. (Safety) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Request for Proposal No. FP802-7-0456) by the Department of Fisheries and Oceans (the Department) of a safety program management system.

Safety alleged that, because the Department was preoccupied with ensuring that Det Norske Veritas (DNV), the eventual contract awardee, be the successful contractor, it failed to give Safety credit for many aspects of its proposal. Safety alleged that the Department grossly and unfairly underscored its competitive bid, thereby eliminating it from consideration during the second stage of the bid selection process. Specifically, Safety alleged that: (1) the Department failed to accept its accreditation even though Safety met all the required criteria set out in the Statement of Work; (2) the Department's scoring of its proposal was unfair and not justified due to the fact that it pre-judged it and neglected to study fully all aspects of its proposal; and (3) the tendering process for this contract was biased toward a specific body of safety associations in which DNV has a business affiliation.

Safety requested, as a remedy, that its proposal be re-evaluated fairly and that, if it rates in the competition, it should be awarded the contract. In the alternative, Safety seeks compensation for the cost of preparing its bid, its loss of profit and the cost of filing and pursuing this complaint with the Canadian International Trade Tribunal (the Tribunal).

On June 1, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into this matter. On June 25, 1998, the Department filed a Government Institution Report (GIR) with the

1. R.S.C. 1985, c. 47 (4th Supp.).

2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On July 8, 1998, Safety filed comments on the GIR with the Tribunal. On July 29, 1998, the Tribunal asked the Department to provide additional information on audit accreditation. The Department responded on August 10, 1998, and, on August 14, 1998, Safety filed comments in reply.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On October 28, 1997, the Department issued a Request for Proposal (RFP) for the subject solicitation with a closing date of December 11, 1997.

The RFP included, in part, the following information with respect to the evaluation of proposals:

Your proposal will be evaluated in accordance with the Selection Criteria and Weighting Factors detailed at Appendix "E". Proposals which fail to meet a minimum of 75% of technical category (selection criteria exclusive of cost) will be considered non-responsive to the tender call and not considered further.

APPENDIX "E"

SELECTION CRITERIA

1. CAPABILITY AND CAPACITY TO CARRY OUT THE WORK

(35 points - Weighting factor 20)

- 1.1 Qualifications (10 points)
 - a) Is the proposed team composed of a balance of systems and training development project managers, auditors, and safety program accredited personnel?
 - b) Compare qualifications, commitment, and depth of the Contractor to deal with changes in project personnel.
- 1.2 Experience (10 points)
 - a) Are the project personnel proposed by the Contractor experienced in developing safety management systems and providing the supporting training?
 - b) Ensure that the personnel shown by the Contractor are the resources assigned to the project and not an inventory of the senior employees of the Contractor who may only exercise oversight functions.
- 1.3 Reference Checks (15 points)
 - a) Has the Contractor completed similar projects of this type for organizations of national or international stature possessing wide-ranging operations?
 - b) Three specific references should be given and the Contractor's work and level of involvement must be confirmed independently.

3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

2. ABILITY TO PROVIDE AUDIT APPROVAL AND ACCREDITATION

(15 points - Weighting factor 10)

- a) Does the Contractor belong to, or have approval from, a recognized body that has empowered the Contractor with the ability to assess and approve internal audit functions to a recognized standard?
- b) Is the Contractor able to convey audit accreditation to Departmental employees who will perform internal audit activities to verify the condition of the safety program management system?

3. MANAGEMENT OF THE WORK (15 points - Weighting factor 15)**3.1 Scheduling (3 points)**

- a) Is the Work Plan (calendar of events, milestones) realistic and will it provide the end product within the time allotted?
- b) Are the milestones and calendar of events logically chosen and do they provide for contingencies? Is the timing realistic and appropriate for the work?

3.2 Control of Work (3 points)

- a) What systems are proposed to control the quality of products at the different milestones?
- b) What contingency plans are in place should announced and dedicated resources become unavailable?

3.3 Deliverables (9 points)

- a) Do proposed deliverables satisfy the statement of work?

4. SUB-TOTAL OF TECHNICAL POINTS 1 THROUGH 3

Score must be greater than 860 (Weighted) for further assessment.

6. QUALITY OF PRESENTATION (10 points - Weighting factor 50)

- 6.1 Only the four Contractors having the lowest dollars to point ratio will be invited to make an oral presentation.

During the bidding period, the Department issued two addenda to the RFP. The first addendum extended the closing date to December 17, 1997. The second addendum, dated December 9, 1997, provided bidders with clarifications and additional information. It reads, in part, as follows:

Question 9.

Reference: Statement of Work p. 3 of 9 Paragraph 2.1.iii) states that the training provided to the Health and Safety Advisors will lead to recognized accreditation of safety program auditors. On page 1 of 2 of the Contractor Selection Criteria 2.a) the criteria demands that the Contractor belongs to, or have approval from, a recognized body that has empowered the Contractor with the ability to assess and approve internal audit functions to a recognized standard. Further 2.b) demands that the Contractor be able to convey audit accreditation to departmental employees who will perform internal audit activities to verify the conditions of the safety program management system.

Question 10.

We need clarification on whether the accreditation is in internal audits or special accreditation as safety program auditors?

Question 11.

If the accreditation is for safety program auditors, do you have a specific accreditation body in mind?

Question 12.

We need clarification on criteria 2.b) of the Contractor Selection Criteria where you demand that the contractor be able to convey audit accreditation. Contractors are not in a position to provide accreditation to departmental employees. Accreditation are normally provided by professional bodies?

Question 13.

Is it your intent that the Contractor will, through the training, convey sufficient knowledge so that the Health and Safety Advisors will be in a position to become accredited by such professional bodies?

Answer 9, 10, 11, 12, 13

Our objective is to provide our OSH Staff with training and experience to seek accreditation from a recognized Accrediting Organization such as the Association of Accredited Safety Officers. Some companies provide recognized training that will count towards the accreditation with the Accrediting institution. This is not an internal audit program.

According to the Department, five proposals were received, including one from Safety and one from DNV. A selection committee of three officials, one from the Department, one from the Treasury Board Secretariat and one from the Department of Health, evaluated the proposals. According to the committee's evaluation report, DNV's proposal was the only one that met the minimum score of 860. Safety's proposal was not considered further. On February 16, 1998, a contract was issued to DNV in the amount of \$897,808.

VALIDITY OF THE COMPLAINT

Safety's Position

Safety submits that, contrary to the Department's claim that it conducted a competitive tender for this solicitation, in fact, from the onset, DNV, with the Industrial Accident Prevention Association (IAPA), was the Department's contractor of choice. According to Safety, this is reflected by the inclusion in the RFP of section 2.1(iii) of the Statement of Work, which reads as follows: "The delivery of training and follow-up, in both official languages, for Departmental safety and health advisors that will lead to recognized accreditation as safety program auditors. The provision of continuing education of occupational safety and health advisors so that audit credentials are maintained and enhanced. The provision of support and oversight to the internal safety program auditors through the assessment of their audit findings and the making of recommendations for additional training and mentoring as required." This requirement, Safety contends, would preclude 99 percent of companies interested in this solicitation from qualifying, and this explains why only five bids were received by the Department.

Safety adds that only two organizations in Canada, itself and the IAPA with its commercial partner, DNV, can deliver training which leads to a recognized accreditation of safety program auditors. Insofar as the IAPA is concerned, Safety further submits that this Ontario-based government-funded organization has used, since the early 1970s, under contractual arrangement, the safety rating system of the International Loss Control Institute of Atlanta, Georgia, which was purchased about five years ago by DNV. In addition, Safety submits that the IAPA gets much of its funding from the Workers' Compensation Board of Ontario, which helped the Department draft the specifications for this RFP.

Though the seniority and qualifications of the members of the selection committee are impressive, Safety submits that none of them are seasoned occupational health and safety professionals. Further, they each have a direct or indirect association with the IAPA.

Concerning the rating of its proposal by the selection committee, Safety submits that, in respect of the RFP, Appendix “E,” “Selection Criteria,” item 1, “Capability and Capacity to Carry Out the Work,” it included, in its proposal, the résumés of four consultants, all certified accredited auditors. In addition, three of the four consultants had qualified to become holders of the licentiate in health and safety auditing, and two of the consultants were also certified as safety program auditors in the DNV/IAPA system. Safety also documented, in its proposal, its past experience in completing similar or higher dollar value projects.

Concerning item 1.1a) of Appendix “E” of the RFP for which it lost one evaluation point, Safety submits that the RFP did not define what qualification was to be measured and how it was to be measured and, in any event, surmises that combined practical and proven business qualifications and 60 years of management experience should exceed a theoretical Bachelor of Administration degree. In respect of item 1.1b), for which it received zero out of five points available, Safety submits that it clearly stated in its proposal that “a dozen other qualified and experienced trainers and auditors could stand in as required” and that it would be foolish and overkill to have submitted all 12 résumés with the proposal. Concerning items 1.2, “Experience,” and 1.3, “Reference Checks,” for which it scored zero, Safety submits that the Department failed to carefully read its proposal, including the résumés of the consultants. In addition, though it had given, in its proposal, the names of three international corporations as references, the Department never contacted these references.

Concerning item 2 of Appendix “E” of the RFP, “Ability to Provide Audit Approval and Accreditation,” for which it also scored zero, Safety submits that there is no regulating body in Canada, or indeed in the world, to assess and approve internal audit functions to recognized standards. Safety submits that such standards are set by independent organizations/associations and adds: “Thus, DNV/IAPA set their own standard, and [Safety] has set its own standard back in 1982.” Concerning the Department’s assertion that there was no evidence submitted in its proposal demonstrating a link between it and any accrediting bodies, Safety submits that: (a) it is the Canadian representative to the Institute of Chemical Engineers which is currently developing an international standard for safety, health and environmental auditors; (b) it owns the trademarks and proprietary rights to the 5 Star Health & Safety Management System; (c) it is the training and examining body for certified accredited auditors through the 5 Star Health & Safety Institute; (d) it trains auditors to the standard required to complete the licentiate in health and safety auditing, the world’s highest standard of health and safety auditing qualification; (e) it has several strategic alliances, for example, with the Canada Safety Council, the British Safety Council, the World Safety Organization, etc.; and (f) it has been recognized by Lloyd’s of London. Certainly, Safety submits, all this information was worth some points. Safety adds that the RFP did not require the production of a professional code of conduct and, therefore, that it cannot be penalized for not having submitted its code of conduct with its proposal.

Concerning the management of the work, item 3.1 of Appendix “E” of the RFP, “Scheduling,” Safety submits that the use of a calendar schedule, though it might not score full marks for appearance, was acceptable to show the overall sequencing and achievement of the deliverables and should have received some evaluation points. As well, Safety submits that it was improperly penalized for scheduling inconsistencies while the difficulty arises only from the evaluators’ lack of understanding of its proposal. Concerning items 3.2, “Control of Work,” and 3.3, “Deliverables,” Safety submits that its quality control is

built into its processes and that reference checks would have confirmed this fact. As well, the deliverables were clearly set out in its proposal.

In summary, Safety submits that, because the selection committee was preoccupied with ensuring that DNV be awarded the contract, it failed to recognize and give proper credit to Safety's proposal. Accordingly, its proposal was not studied adequately, the safety management system that it proposed was not read and understood, and the references that it provided were not contacted. All this, Safety submits, resulted in its offer being scored well below the minimum required for further consideration and possible contract award.

In its final comments of August 14, 1998, Safety submits that, every time the Department provides comments or information, the "goal post" is moved. For example, it submits that nowhere in the specification did the Department define "a recognized body." Safety submits that it identified itself as a recognized body and that, according to the terms of the RFP and the information contained or referred to in its proposal, this should have sufficed to establish Safety as an accredited body. Similarly, Safety submits that the definition of a "recognized standard" offered by the Department was never mentioned in the original specification. As well, the Department's mention of the requirement for re-certification or re-articling on an ongoing basis as a part of the "recognized standard" is a requirement not mentioned in the Statement of Work. The question of the strategic alliances is also a new requirement, since it was not mentioned in the original specification. This new information, Safety submits, reinforces two conclusions which it already had, namely, that the outcome of this solicitation was a "*fait accompli*" in favour of DNV from the outset and that the selection committee lacked professionalism, integrity and objectivity in completing the selection process.

Department's Position

The Department submits that it was not preoccupied with ensuring that DNV be the successful bidder, as is alleged by Safety. It submits that Safety's proposal was rated in accordance with the conditions of the tender documents. The Department submits that it publicly disclosed all the selection criteria to the bidders prior to the tender closing date and that at no time during the tender period did any of the bidders request that the selection criteria be revised.

Specifically, in respect of item 1.1a) of Appendix "E" of the RFP, the Department submits that Safety's proposal did not demonstrate accreditation in project management. Further, it submits that qualification refers to education and not experience, which is rated in item 1.2. The Department submits that, under item 1.1b), it was looking for a backup plan for the main team of workers. Given the complexity and duration of the project (two years), the Department submits that, at any time, the main consultants could become unavailable for any reason. Therefore, the Department submits, it was crucial that bidders demonstrate that they had a second string of consultants and that the second string was as qualified as the first. The Department submits that Safety failed to do so in its proposal and that, therefore, this element of scoring was not assessable.

The Department further submits that Safety lost two points under item 1.2 of Appendix "E" of the RFP, "Experience," because it failed to mention in its proposal, as it is now contending, that three of its team members had been certified in the DNV/IAPA system.

According to the Department, Safety lost three points under item 1.3 of Appendix "E" of the RFP, "Reference Checks," because its proposal did not address the issue of auditor training for any of the

companies for which work had been done in the past. In that sense, Safety failed to link its past experience to the requirements of the Statement of Work.

Concerning item 2 of Appendix “E” of the RFP, “Ability to Provide Audit Approval and Accreditation,” for which Safety lost 15 points, the Department submits that Safety failed to indicate in its proposal any link to recognized accrediting bodies. The Department submits that Safety provided supplemental material to the Tribunal along with its complaint, documenting, in part, a strategic alliance with Lloyd’s of London. Much of this material did not form part of Safety’s proposal and, therefore, the Department submits, is irrelevant to Safety’s position.

Concerning item 3 of Appendix “E” the RFP, “Management of the Work,” for which Safety lost 8 out of 15 points, the Department submits that the information submitted by Safety in its proposal was incomplete, unclear and of a quality not commensurate with a project of this value.

The Department concedes that 2 points were missed in computing Safety’s total for technical points under item 1.2, “Experience,” and that, therefore, taking into consideration the applicable weighting factor, Safety should have received 40 additional points. However, Safety’s revised total for technical points remains well below the minimum requirement of 860 points to accede to the oral presentation phase of the evaluation process.

Concerning Safety’s claim that videos provided with its proposal were not considered at the time of the evaluation, the Department submits that the above-mentioned videos were provided to the Department under separate cover on November 28, 1997. Given that these videos were not part of Safety’s proposal, they were not previewed by the selection committee. The Department further submits that there was no error in the weighting of the selection points; that the IAPA had no input in the development of the Statement of Work for the occupational safety and health oversight contract; and that no restrictions were imposed on bidders as to whom they wished to have present to assist with their oral presentation.

In conclusion, the Department submits that Safety’s proposal was evaluated according to the terms of the RFP and strictly on its contents. Consideration could not be given to data not included in the proposal at the time of tender closing.

In its supplementary submissions, the Department indicates that a “recognized body” in respect of audit accreditation is an organization, such as Lloyd’s of London, Lloyd’s Germanischer or the Accredited Safety Auditors Association, that has some standing and a positive reputation in the community at large. The Department adds that the expression “recognized standard” was meant to mean an approach that most bodies would use in setting a standard or designation by which they would assess individuals looking for accreditation. The standard would normally involve an assessment of the individual’s knowledge, background experience, training and ability to audit in the field of safety and health. A recognized body would also want to ensure that, over time, any individual who is given accreditation is worthy of maintaining that accreditation.

TRIBUNAL’S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedure and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the

Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the *North American Free Trade Agreement*,⁴ (NAFTA), the *Agreement on Government Procurement*⁵ (AGP) or the *Agreement on Internal Trade*⁶ (AIT), whichever one applies.

Essentially, Safety alleged that the tendering process for this solicitation was biased in favour of DNV. Safety alleged that, as a result, not only were the specifications of this requirement biased towards a specific body of safety associations but, in addition, the Department failed, in evaluating its proposal, to fairly apply the evaluation criteria set out in the RFP.

Articles 1008.1(a) and (b) of NAFTA and Article VII.1 of the AGP provide that the tendering procedures of a party's entities must be applied in a non-discriminatory manner and must be consistent with Articles 1009 through 1016 of NAFTA and Articles VII through XVI of the AGP. Article 501 of the AIT provides that potential suppliers are to have equal access to government procurement.

Article 1015.4(d) of NAFTA and Article XIII.4(c) of the AGP provide that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation." Article 506(6) of the AIT provides, in part, that the "tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

The Tribunal must determine whether the selection criteria and weighting factors were clearly set out in the RFP and whether, in evaluating Safety's proposal, the Department applied fairly the selection criteria and essential requirements set out in the RFP.

In respect of the clarity of the selection criteria and weighting factors set out in Appendix "E" of the RFP, the Tribunal is satisfied that they are clear. In addition, as evidenced by the contents of the second addendum to the RFP, certain bidders sought confirmation of the meaning of certain criteria. If Safety still had difficulty after these confirmations were issued, or still had, in its words, concerns about the biased nature of certain criteria, it should have raised the matter with the Department or the Tribunal within the prescribed time frames. This was not done.

Concerning the evaluation of Safety's proposal proper, the Tribunal is satisfied that it was conducted by a qualified and objective selection committee in accordance with the criteria and weighting factors set out in the RFP.

The Tribunal notes, first, that the three members of the selection committee currently assume responsibilities in the field of occupational health and safety. As well, two of the committee members are from outside the Department, namely, the Department of Health and the Treasury Board Secretariat. The Tribunal also notes that each of the rated elements of Safety's proposal was reviewed by the selection committee and evaluated according to the methodology set out in the RFP. In this regard, the Tribunal observes that the selection committee was consistent in the awarding of rating points. Where, in its judgment, an element of a bidder's proposal met the requirements of the RFP, it awarded that element all the rating points related thereto. Similarly, it awarded none of the rating points to a particular element when, in its

4. *Canada Treaty Series*, 1994, No. 2 (C.T.S.), as signed on December 17, 1992.

5. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

6. As signed at Ottawa, Ontario, on July 18, 1994.

judgment, such elements failed to meet the requirements of the RFP. This explains the zero ratings found in the evaluation of Safety's proposal, as in the evaluation of most other bids.

The Tribunal also notes that the Department limited its evaluation of Safety's proposal to the contents of the proposal as submitted on bid closing date. This is why the Department did not review, for bid evaluation purposes, the videos provided by Safety on November 28, 1997, or the information provided by Safety in its complaint to the Tribunal, but not included in its proposal. The Tribunal is satisfied that the Department acted according to the provisions of the trade agreements when it limited its review of Safety's proposal to the material submitted therein at the time of bid closing.

Concerning Safety's allegation that the Department failed to seek clarification or to contact the references submitted by Safety in its proposal, the Tribunal is of the view that the Department was under no obligation, in the circumstances, to seek clarification or to contact the references provided by Safety before completing the first stage of the evaluation.

A major point of contention between Safety and the Department, in this case, is whether Safety met the requirement under item 2 of Appendix "E" of the RFP that deals with audit approval and accreditation. In its proposal, Safety essentially proposed itself as the recognized body that had empowered it with the ability to assess and approve internal audit functions to a recognized standard. The Department judged that this was not sufficient to meet the requirement under item 2a). The Tribunal agrees that this determination by the Department was reasonable, based on the information contained in Safety's proposal. Although Safety presented some information in its complaint that may well have shown that it met this requirement, for the reasons explained above, this information should have been provided to the Department in its proposal for the selection committee to take it into consideration.

Safety submits that the Department's action, particularly its failure to recognize Safety as an accredited body, reflects negatively on it and is the cause of a serious prejudice to Safety's international reputation. In the Tribunal's view, the Department did not evaluate Safety's capabilities as a business enterprise to meet the requirements stated in the RFP or pronounce itself on Safety's capacity to deliver such work. In the Tribunal's view, the Department conducted an objective evaluation of Safety's proposal in accordance with the selection criteria and weighting factors set out in the RFP. As a result of this evaluation, the Department concluded that the proposal failed to meet the requirements necessary to proceed to the second stage of the evaluation. The Tribunal finds nothing improper with these actions by the Department.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with the provisions of NAFTA, the AGP and the AIT and, therefore, that the complaint is not valid.

Raynald Guay

Raynald Guay

Member